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No. 02-1377

In The
Supreme Court of the United States

BUCK DOE,

Petitioner,

v.

ELAINE L. CHAO, SECRETARY OF LABOR,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICI CURIAE* LINDA R. TRIPP AND THE NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF

Pursuant to Rule 37(3)(b) of the *Rules of the Supreme Court of the United States* (hereinafter "Rules"), Linda R. Tripp and the National Whistleblower Center (hereinafter "Center") jointly move, by and through counsel, for leave to file an *amici curiae* brief in support of Petitioner in the above-captioned matter.

Pursuant to Rule 37(3)(a) of the Rules, the above-referenced *amici* parties have sought and obtained written consent from all the parties to the case to file an *amici curiae* brief.

Linda R. Tripp is a well-known whistleblower whose rights under the Privacy Act of 1974 were violated in retaliation for exposing wrongdoing by high ranking government officials. Notably, the Defense Department has admitted that it violated the Privacy Act when it intentionally or willfully disclosed, without Ms. Tripp's consent, confidential information about Ms. Tripp from government personnel and security clearance files. Ms. Tripp, who has previously been admitted by the Court as an *amicus curiae*, has a direct and substantial interest in the outcome of this case. *See* Statement of Interest, *infra*.

Additionally, the Center is a nonprofit, non-partisan, tax-exempt, charitable, and educational organization dedicated to the protection of employees who "blow the whistle" and report misconduct in the workplace. As such, the Center, which has also previously been admitted as an *amicus curiae* before this Court, works directly with whistleblowers nationwide who have a direct and substantial interest in the outcome of this case. *See* Statement of interest, *infra*.

By filing an *amici curiae* brief, both Ms. Tripp and the Center strive to help the Court by bringing to its attention relevant matter not already presented to the Court by the parties. For this reason and the reasons stated above, Linda R. Tripp and the National Whistleblower Center jointly request leave to file an *amici curiae* brief in this matter.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICI CURIAE* LINDA R. TRIPP AND THE NATIONAL WHISTLEBLOWER CENTER[1]

Linda R. Tripp is a well-known whistleblower who has been subjected to a campaign of retaliation and harassment in response to her reporting of serious misconduct by high-ranking government officials. In retaliation for Ms. Tripp providing evidence to the Office of Independent Counsel, which, *inter alia,* eventually resulted in the impeachment of President Clinton, the Defense Department leaked highly confidential information about Ms. Tripp from government files to discredit and malign her. Notably, the government has officially acknowledged that it violated Ms. Tripp's rights under the Privacy Act of 1974 when the Defense Department wrongfully leaked to the news media confidential information from Ms. Tripp's personnel and security clearance files. *See, Tripp v. Dep't. of Defense,* 219 F.Supp.2d 85, 87 (D.D.C. 2002) ("DOD subsequently conceded liability for the particular disclosure to *The New Yorker* journalist as a violation of the anti-disclosure provision of the Privacy Act, 5 U.S.C. § 552a(b)."). As a result of her whistleblowing activity, Ms. Tripp has experienced harassment and retaliation, including violation of her rights under the Privacy Act, for exposing serious misconduct injurious to the public good. Additionally, in 2002, Ms. Tripp was admitted by this

[1] Pursuant to Rule 37.6, Ms. Tripp and the Center state that no monetary contributions were accepted for the preparation or submission of this *amici curiae* brief and that *amici's* respective counsel, David K. Colapinto, Stephen M. Kohn and Michael D. Kohn, authored this brief in its entirety. Counsel for all parties have consented to the filing of an *amici curiae* brief by Ms. Tripp and the Center.

Court as an *amicus curiae* in *Doyle v. Hydro Nuclear Services, Inc.*, 123 S.Ct. 620 (2002).

The National Whistleblower Center (Center) is a nonprofit, tax-exempt, non-partisan, charitable, and educational organization dedicated to the protection of employees who "blow the whistle" and report misconduct in the workplace. In both the public and private sector, the Center assists employees who have suffered retaliation due to the disclosure of matters in the interest of public health and safety. The Center aids employee whistleblowers who have been involved in environmental protection, nuclear safety, government accountability, and the advocacy of important public policy.

In addition to its involvement in whistleblower litigation, the Center remains active in the education and advocacy of whistleblower protection. The Center sponsors and participates in public education programs and training seminars throughout the country. Furthermore, the Center operates an Attorney Referral Service for whistleblowers (with attorney members in 33 states) and maintains an in-depth and informative Internet web site at www.whistleblowers.org. Since 1990, the Center has participated before this Court as *amicus curiae* in a number of cases that directly impact on the rights of whistleblowers, including, *English v. General Electric*, 496 U.S. 72 (1990); *Haddle v. Garrison*, 525 U.S. 121 (1999); *Vermont Agency of Nat. Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000); *Beck v. Prupis*, 120 S.Ct. 754 (2000); and *EEOC v. Waffle House, Inc.*, 122 S.Ct. 754 (2002).

Persons assisted by the Center have a direct interest in the outcome of this case. The Privacy Act is a key piece of legislation to ensure that the privacy rights of citizens

are protected. It cannot be over-stated how vital avenues of legal redress, including rights available under the Privacy Act, are to those courageous employee-whistleblowers, both actual and potential, who put the public good before their own careers. Protecting the privacy of these individuals is an essential component in encouraging employees to reveal severe abuses of power and dangerous industrial practices. It is surely an incontrovertible fact that, even under the best of circumstances, whistleblowers run enormous career risks. If citizens must, as the Fourth Circuit's decision in *Doe v. Chao* holds, demonstrate actual damages in order to be eligible for the $1,000 statutory minimum damages award, then whistleblowers, like other Privacy Act litigants, face even greater disincentives to expose misconduct or violations of law.

SUMMARY OF THE ARGUMENT

In order to combat the wide-spread government abuse of power and misuse of personal information that existed in the years preceding 1974, Congress created a statutory remedy through the Privacy Act to compensate individuals who fell victim to such "intentional or willful" governmental abuses and deprivation of personal privacy rights. Congress intended to encourage the widest possible citizen enforcement of civil remedies and established a statutory minimum to effectuate the legislative purposes for passing the Privacy Act. In the preamble to the Act, Congress expressly stated that it required all Federal agencies to be subject to suit for "any damages" resulting from "intentional or willful" violations of the Privacy Act. By permitting recovery of a statutory minimum damages award of

$1,000, without further proof of actual damages, Congress intended to provide relief to individuals severely harmed by the government's "intentional or willful" conduct, but who may not have suffered actual damages.

Recognizing that the common-law remedies were not sufficient, Congress established a statutory minimum award of $1,000 where Privacy Act violations were proven. While the Privacy Act provides for awards of actual damages beyond the statutory $1,000 minimum award, the Act does not condition or limit the availability of statutory minimum damages upon an award of actual damages. Unlike plaintiffs seeking damages pursuant to the common law, individuals seeking relief under the Privacy Act may elect the statutory minimum of $1,000 in damages where the evidence may not be sufficient to provide for an award of actual damages. This interpretation of the Privacy Act's statutory minimum damages provision is consistent with and derives from the measure of damages for the common law tort of invasion of privacy.

At common law, a plaintiff that prevails on an invasion of privacy claim is not limited to recovery of emotional distress damages alone, and a prevailing plaintiff is always "entitled" to recover damages for the harm to his or her privacy interests. When the Privacy Act was enacted, Congress was fully aware of the unique rules in invasion of privacy tort cases that recognized the difficulties of proof of damages and which permitted an award of presumed damages to prevailing plaintiffs for humiliation, embarrassment and dignity harms. In order to avoid the situation where a prevailing Privacy Act plaintiff might be awarded a *de minimus* amount of damages, without proof of actual damages, Congress created the statutory minimum of $1,000. The statutory minimum damages reflects

the seriousness with which Congress considered privacy right violations by the federal government in 1974. The offensive harm to the privacy rights of the individual and the societal interests in preventing such further widespread abuses by the federal government compelled Congress to establish a statutory minimum damages award as a result of proving an "intentional or willful" violation of the Privacy Act and an "adverse effect" resulting from that violation.

ARGUMENT

I. THE PRIVACY ACT'S MINIMUM DAMAGES PROVISION IS CONSISTENT WITH AND FULFILLS THE STATUTORY PURPOSES OF THE ACT.

Congress created a statutory remedy to permit the recovery of a statutory minimum level of damages in cases where an individual could prove an "adverse effect" resulting from an "intentional or willful" violation of the Privacy Act. 5 U.S.C. § 552a(g)(1)(D) and (g)(4). The Congressional purpose for enacting the Privacy Act of 1974 was both to encourage "the widest possible citizen enforcement" of the Act's remedial protections, *see,* S. Rep. No. 1183, 93rd Cong., 2d Sess. at 1 & 83, *reprinted in* U.S. Code Cong. & Ad. News at 6916 & 6997 (hereinafter, "USCAN"), *and in Legislative History of the Privacy Act of 1974,* at 154 and 236 (1976) (hereinafter, "*Sourcebook*"); and, by so doing, to redress and prevent serious governmental abuses resulting in the violation of the privacy rights of citizens. *Id.,* USCAN 6916, 6917, *Sourcebook,* at 154-55 (remarks of Sen. Ervin) ("It is designed to prevent the kind of illegal, unwise, overbroad, investigation and record surveillance of

law-abiding citizens produced in recent years from actions of some over-zealous investigators, and the curiosity of some government administrators, or the wrongful disclosure and use, in some cases, of personal files held by Federal agencies.").

At the time the Privacy Act was enacted, Congress was concerned with preventing further government abuses such as "uncontrolled Government surveillance," the FBI's "cointelpro" program, and " . . . sending false and anonymous letters to discredit selected individuals in the eyes of their peers, informing an employer of the individual's membership in a particular group so that the individual might be fired, and passing on information to . . . harm the individual economically." *See Sourcebook* at 793 (remarks of Sen. Muskie).

Among the many concerns cited by members of Congress for enacting the Privacy Act included the "creation of the 'Plumbers,' a White House unit which carried out the break-in at Daniel Ellsberg's psychiatrist's office and engaged in other questionable surveillance activities," illegal "spying secretly conducted by 1500 agents of the U.S. Army on more than 100,000 civilians in the late 1960's," and "secret" and illegal "wire-taps" and selective disclosure or misuse of private information (including information from federal tax returns) for "political purposes," *see Sourcebook* at 795-798 (remarks of Sen. Nelson), and "Watergate and related scandals" that "have brought to light a callous disregard for the law and for the

sanctity of individual rights . . . " *Sourcebook* at 800 (remarks of Sen. Jackson).[2]

Congressional findings set forth in the preamble of the Act expressly provide, *inter alia,* that the "right to privacy is a personal and fundamental right protected by the Constitution." *See* P.L. 93-579, 88 Stat. 1896, the Privacy Act of 1974, Congressional Findings and Purpose § 2(a) (reprinted at 5 U.S.C. § 552a Note).

Congress intended to establish a statutory minimum to effectuate the legislative purposes for passing the Privacy Act. Obviously, Congress considered the widespread government abuse of power and misuse of personal information that existed in the years preceding 1974 and Congress created a statutory remedy through the Privacy Act to compensate individuals who fell victim to such "intentional or willful" governmental abuses and deprivation of personal privacy rights.

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[2] The government's retaliatory action against Ms. Tripp, which the government has admitted was in violation of the Privacy Act, is a modern-day example of the type of government abuse the Privacy Act was intended to combat. *See, Tripp v. Dep't. of Defense,* 219 F.Supp.2d 85, 87 (D.D.C. 2002) (noting that government conceded Privacy Act violation). The "scheme to defame and destroy the public image of Linda Tripp with the intent to influence, obstruct, and impede the conduct and outcome of pending investigations and prosecutions" is nearly identical to the action taken by Charles Colson and the "Plumbers" against Daniel Ellsberg to influence and impede pending investigations. *See* 106 Cong. Rec. S4939 (Sen. daily ed. June 12, 2000) (remarks of Sen. Inhofe). The government's admitted violation of the Privacy Act as a means to discredit Ms. Tripp demonstrates how the government still misuses information in reprisal against whistleblowers and for political purposes.

That statutory minimum damages are separately recoverable from "actual damages" under the Privacy Act is fully consistent with the purposes of the Act and other provisions of the Act.[3] Significantly, the Privacy Act's preamble specifically waives sovereign immunity "by requiring Federal agencies" to "be subject to civil suit for *any* damages which occur as a result of willful or intentional action which violates any individual's rights under this Act." *See* P.L. 93-579, 88 Stat. 1896, Congressional Findings and Purpose § 2(b)(6) (reprinted in 5 U.S.C. § 552a Note) (emphasis added). *Also see, Johnson v. Dept. of Treasury, Internal Revenue Serv.*, 700 F.2d 971, 975 (5th Cir. 1983) (noting preamble). Surely, the Privacy Act's statutory minimum damages are a type of "*any* damages" for which suit has been expressly consented as stated in the Act's preamble.

Indeed, the recovery of the statutory minimum damages are often the only kind of damages available to a prevailing Privacy Act plaintiff. Permitting recovery of a statutory minimum award of $1,000 affords relief to those severely harmed by the government's "intentional or willful" conduct, but who may not have suffered actual damages. *See Wilborn v. Dept. of Health & Human Serv.*, 49 F.3d 597, 603 (9th Cir. 1995), *citing Fitzpatrick v. IRS*, 665 F.2d 327, 330 (11th Cir. 1982) (purpose of minimum damage provision is to give those with "no provable damages" the incentive to sue). In order to avoid the absurd

[3] *See also, Parks v. United States Internal Revenue Serv.*, 618 F.2d 677, 683 n2 (10th Cir. 1980) (finding that "[t]he grant of a cause of action to any 'aggrieved person' is designed to encourage the widest possible citizen enforcement through the judicial process").

result of Privacy Act plaintiffs proving a violation but having no remedy, Congress created a statutory minimum and required that all Federal agencies be subject to suit and liable for at least the $1,000 minimum damages.

However, a restrictive interpretation of the Act, as Respondent urges, that limits statutory minimum damages upon a recovery of actual damages "would frustrate the purposes of the civil remedy" and enforcement provisions because litigants who prove intentional or willful violations of the Act would frequently be left without any remedy, and "an inadequate recovery would reduce both the deterrent impact on the government and the incentives for citizen enforcement." *See* 52 *Fordham L. Rev.* 611, 622, "Damages Under the Privacy Act of 1974: Compensation and Deterrence," *citing Johnson, supra.*, 700 F.2d at 977.

More significantly, the narrow interpretation adopted by the Fourth Circuit in this case is also at odds with the express statement of Congressional purpose in the Privacy Act preamble that sovereign immunity was waived with respect to claims for "*any* damages" arising from a violation of the Act. *See* P.L. 93-579, 88 Stat. 1896, Congressional Findings and Purpose § 2(b)(6) (reprinted in 5 U.S.C. § 552a Note) (emphasis added).

As a practical matter, the Fourth Circuit's narrow interpretation of section (g)(4) of the Act that requires a prevailing plaintiff to prove substantial "actual damages" before being eligible for the $1,000 minimum statutory damages would effectively eliminate altogether the statutory minimum. It is highly unlikely Congress created the statutory minimum to apply only in cases where "actual damages" were proven, because if a plaintiff were able to

prove such damages the award would likely exceed the $1,000 threshold, thus rendering the statutory minimum a needless surplusage.

The Privacy Act, the preamble to the Act, and the legislative history of the Act, repeatedly emphasize the importance of protecting personal privacy as a fundamental and constitutional right, and reflect a strong intent that the civil remedies and enforcement provisions further the Act's compensatory and deterrent goals. The Act's preamble expressly requires that "*any* damages" be awarded when a Privacy Act violation is proven. *See* P.L. 93-579, § 2(b)(6) (reprinted in 5 U.S.C. § 552a Note) (emphasis added). It is only by permitting the recovery of statutory minimum damages in Privacy Act cases, without requiring additional proof of "actual damages," that the Act's statutory purposes can be fulfilled.

II. THE AVAILABILITY OF MINIMUM STATUTORY DAMAGES IS NOT LIMITED BY ACTUAL DAMAGES.

Unquestionably, Congress "borrowed from the common law in designing the remedy provision" of the Privacy Act. *See Johnson, supra.*, 700 F.2d at 977. *Accord.*, *Parks, supra.*, 618 F.2d at 683 ("It appears from the Act that Congress was borrowing from the common law tort of invasion of privacy.").

Congressional reliance on the common law invasion of privacy tort is also reflected throughout the Privacy Act's legislative history. *See Sourcebook* at 769 (remarks of Sen. Ervin) (the Act implements "those recognized values of Western jurisprudence and democratic constitutional government" and "they are the principles upon which our own

Constitution rests"); *Id.*, at 784 (remarks of Sen. Muskie) ("The Federal Privacy Act draws upon the constitutional and judicial recognition accorded to the right of privacy and translates it into a system of procedural and substantive safeguards against obtrusive Government information gathering practices."); *Id.*, at 803 (remarks of Sen. Goldwater) ("By privacy, I mean . . . the right to be protected against disclosure of information given by an individual in circumstances of confidence, and against disclosure of irrelevant embarrassing facts relating to one's own private life . . . " and "what the U.S. Supreme Court has referred to as the embodiment of 'our respect for the inviolability of the human personality,' and as a right which is 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' ").

At common law, a prevailing plaintiff who proved an invasion of privacy tort could collect general or presumed damages. Thus, entitlement to the statutory minimum damages under the Privacy Act, without additional proof of actual damages, is fully consistent with the measure of damages for the common law tort of invasion of privacy.

A plaintiff that prevails on an invasion of privacy claim "is entitled to recover damages for (a) the harm to his interest in privacy resulting from the invasion; (b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and (c) special damage . . . " *Restatement (Second) of Torts*, § 652H. However, damages at common law are not limited to recovery to emotional distress damages alone, and a prevailing plaintiff is always "entitled" to separately recover damages for the harm to his privacy interests. *Id.*

It has long been recognized that presumed damages are always available to compensate for the invasion itself of the privacy interest. *See* 2 Dobbs, *Law of Remedies,* § 7.3(4) at 316-317 (1993). As one court noted:

> The fact that damages resulting from an invasion of the right of privacy cannot be measured by a pecuniary standard is not a bar to recovery. While special damages may be recovered if sustained, general damages may be recovered *without a showing of specific loss.*

Fairfield v. American Photocopy Equip. Co., 138 Cal. App. 2d 82, 291 P.2d 194, 198 (1955) (emphasis added).

The common law rule permitting recovery of general or presumed damages in invasion of privacy tort cases continues to be followed by the courts. *See Hayes v. Alfred A. Knopf, Inc.,* 8 F.3d 1222 (7th Cir. 1993) ("the nature of the injury shows . . . that the defendants are wrong to argue that this branch of the right of privacy requires proof of special damages"); *Nolley v. County of Erie,* 802 F. Supp. 898, 903, 905 (W.D.N.Y. 1992), *set aside on other grounds, on remand,* 798 F. Supp. 123 (W.D.N.Y. 1992) (presumed damages available for privacy action based on unwarranted disclosure of plaintiff's HIV status); *Snakenberg v. Hartford Casualty Ins. Co.,* 299 S.C. 164, 172, 383 S.E.2d 2, 6 (Ct. App. 1989) (held that if a plaintiff proves liability of the defendant for an intrusion then "the fact of damage is established as a matter of law"); *Rumbauskas v. Cantor,* 266 N.J. Super. 399, 629 A.2d 1359, 1361-62 (App. Div. 1993), *cert. granted,* 134 N.J. 565, 636 A.2d 522 *and rev'd on other grounds,* 138 N.J. 173, 649 A.2d 853 (1993) (harm under § 652H does not require emotional distress or physical injury); *K-Mart Corp. Store No. 7441 v. Trotti,* 677 S.W.2d 632, 638-40 (Tex. App. Houston 1st Dist. 1984) ("This intrusion itself is actionable.").

A similar approach was taken to determine the appropriate measure of damages for invasion of privacy to victims of the government's illegal domestic mail opening program. *See Birnbaum v. United States,* 436 F.Supp. 967, 987-989 (E.D.N.Y. 1977). In *Birnbaum,* the court found that the Central Intelligence Agency ("CIA") violated the plaintiffs' common law privacy rights as a result of the CIA's mail opening program that took place between 1953-1973, and awarded each plaintiff the sum of $1,000 in damages under the Federal Tort Claims Act ("FTCA"). *Id.*[4] In reaching the $1,000 per plaintiff damages award the court expressly noted that the "lack of objective harm" is "no bar to recovery" and that such awards are appropriate to compensate for "the injury of invasion itself." *Id., citing Restatement (Second) of Torts,* § 652H. Notably, the court observed that "a deprivation of common law privacy is *an independent injury for which damages are appropriate.*" *Id.,* 436 F.Supp. at 987 (emphasis added).

In another FTCA case, where there was no evidence of emotional distress damages presented, the court held that a political organization was "entitled to recover for the harm to its interest in privacy" as a result of the invasion of privacy from the "193 burglaries" of its offices committed by the Federal Bureau of Investigation ("FBI") over a ten-year period. *See Socialist Workers Party v. Attorney*

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[4] On appeal, the Second Circuit affirmed the district court's $1,000 per plaintiff damages award under the FTCA, but reversed an order requiring the CIA to issue letters of apology to each plaintiff. *See Birnbaum v. United States,* 588 F.2d 319 (2d Cir. 1978).

General, 642 F.Supp. 1357, 1422 (S.D.N.Y. 1986), *citing Restatement (Second) of Torts,* § 652H. In awarding damages for invasion of privacy, the court "put a value of $500 on the harm to the SWP's privacy interest" for each of the 193 burglaries by the FBI, resulting in a total damages award of $96,500. *Id.*

When the Privacy Act was enacted in 1974, the term "actual damages" was defined as "synonymous with" the terms "compensatory damages" and "general damages." *See, e.g., Black's Law Dictionary,* at 467 (4th Ed. 1968). That definition remains the case today. *See, e.g., Mellinkoff's Dictionary of American Legal Usage,* at 147-148 (Defining "actual damages" as "compensatory damages" and including "general damages" as part of "actual damages"). *Also see, Law Dictionary,* at 124-125 (Barron's 4th ed.) (Defining "general damages" and "compensatory damages" as "actual damages").[5] Without question, "general damages" are considered to include "presumed damages." *See Modern Legal Usage,* at 382 (Oxford Univ. Press, 2d Ed. 1995). Accordingly, when Congress used the term "actual damages" in the Privacy Act it incorporated the prevailing common law definition that "actual damages" included "general damages" and "presumed damages."[6]

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[5] *Accord., Restatement (Second) of Torts,* § 621 ("General damages are a form of compensatory damages.").

[6] Congress is "presumed to know the law." *See Cannon v. University of Chicago,* 441 U.S. 677, 696-99, 99 S.Ct. 1946 (1979). *Also see,* 2B, Singer, *Sutherland Statutory Construction,* § 50:03, p. 150 (6th Ed. 2001) ("The interpretation of well-defined words and phrases in the common law carries over to statutes dealing with the same or similar subject matter.").

This interpretation of the term "actual damages" is required to effectuate the Privacy Act's purposes for the same reasons as stated in Section I, *supra. Also see,* 3, Singer, *Sutherland Statutory Construction,* § 60:1, p. 183 (6th Ed. 2001) (remedial legislation should be broadly construed to effectuate the purpose for which it was enacted).[7] Likewise, for the same reasons, Privacy Act plaintiffs should be able to pursue "actual damages" for emotional distress and other non-pecuniary harm.[8]

Significantly, Congress modified the common law negligence standard for recovery of damages for invasion of privacy by conditioning recovery of any damages under the Privacy Act subject to proof of a violation pursuant to the "intentional or willful" standard. 5 U.S.C. § 552a(g)(4). A plaintiff may satisfy this heightened standard by showing the agency held a reckless or conscious disregard for

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[7] Given the availability of "general" or "presumed" damages as part of "actual damages" at common law, the Privacy Act's incorporation of "actual damages" as part of the statutory remedy also means that a prevailing Privacy Act plaintiff would be entitled to the statutory minimum award without proof of substantial emotional distress. Accordingly, even if the Privacy Act is interpreted to require "actual damages" as a prerequisite to obtaining the statutory minimum award, a plaintiff must still be permitted to obtain "general" or "presumed" damages that are available as "actual damages" at common law. In other words, the availability of statutory minimum damages under the Privacy Act is fully consistent with and derives from the common law definition of "actual damages," which includes "general" or "presumed" damages.

[8] *See Johnson, supra.,* 700 F.2d at 977; *Parks, supra.,* 618 F.2d at 683. Under the common law, damages for emotional distress are unquestionably available for invasion of privacy. *See Time, Inc. v. Hill,* 385 U.S. 374, 386 n9, 87 S.Ct. 534 (1967); *Restatement (Second) of Torts,* § 652H.

the plaintiff's rights under the Privacy Act. *See Waters v. Thornburgh*, 888 F.2d 870, 875 (D.C. Cir. 1989), *quoting Albright v. United States*, 732 F.2d 181, 189 (D.C. Cir. 1984) (liability found when agency acts "without grounds for believing it to be lawful, or by flagrantly disregarding others' rights under the Act"). The heightened standard of proof was no accident and was the subject of debate at the time of enactment. *See Sourcebook*, at 925-29. By codifying this heightened standard of proof, Congress narrowly tailored the Privacy Act's statutory minimum damages "with reference to the nature of the interests protected by" the Act. *See Carey v. Piphus*, 435 U.S. 247, 265, 98 S.Ct. 1042, 1052 (1978). In so doing, Congress balanced the interests sought to be protected by the Privacy Act against other legitimate interests in limiting the recovery of any damages to those cases where invasions of privacy by the government were proven under the "intentional or willful" standard.

Allowing Privacy Act plaintiffs to opt for statutory minimum awards without further proof of actual damages will also encourage citizen enforcement of the Act's civil remedy provisions, because the costly and time-consuming process of proving emotional distress or other types of intangible damages can be avoided. As one commentator has noted:

> The irony of legal redress for mental suffering is that plaintiffs are forced, first in a deposition and again at trial, to testify and be cross-examined on intimate and embarrassing personal details such as humiliation, indignity, nasty jokes by acquaintances, sleepless nights, sexual impotency, mental imbalance causing fights with spouses and friends, inability to perform on the job, psychiatric care and the like. Testifying in court about such matters is itself a grueling experience. Perhaps these brutal realities are the reason few people sue for emotional injuries in a court of law.

Vol. 2, McCarthy, *The Rights of Publicity and Privacy*, § 11:26, pp. 11-55 (West 2000).[9]

Recognizing that the common-law remedies were not sufficient, Congress established a statutory minimum award of $1,000 where Privacy Act violations were proven. In addition, the Privacy Act provides for awards of substantial actual damages beyond the statutory $1,000 minimum award. Notably, Congress did not cap damages. However, the statutory minimum damages in the amount of $1,000 reflects the seriousness with which Congress considered privacy right violations by the federal government in 1974. The severity of harm to the privacy rights of the individual, and the societal interests in preventing such abuses by the federal government, warranted establishing a statutory minimum of $1,000 as a result of proving a violation of the Act. Similar to plaintiffs seeking presumed damages pursuant to the common law, individuals

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[9] *Id., citing, Olan Mills, Inc. of Texas v. Dodd*, 353 S.W.2d 22, 23 (Ark. 1962) (Where, in order to recover $2500 for the unpermitted use of her photo in an advertisement, plaintiff had to testify that: "I hadn't given anybody permission to use my picture. It caused me a lot of humiliation and embarrassment. I have heard remarks on the street when I was passing, people saying, 'I never thought Mrs. Dodd would permit her picture to be used for advertising,' and things like that. I can't sleep."); and *Fairfield, supra.*, 158 Cal. App. 2d at 56 (Where an attorney, in order to recover $1500 for use of his name in advertising a copying machine, had to testify that: "I felt humiliated, embarrassed, chagrined. I was worried, sick. Not sick, scared. And I felt pretty cheap.").

seeking relief under the Privacy Act damages provision may elect the statutory minimum of $1,000 in damages where the evidence may not be sufficient to provide for an award of actual damages. This interpretation of the Privacy Act's statutory minimum damages provision fulfills the legislative goal and purposes underlying the Act and is consistent with the common law rules governing damages for invasion of privacy.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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